THARMALINGAM v. SAMBANTHAN

[C. A. (Thomson C.J., Hill J.A., and Ismail Khan J.) December 14, 1960]

[K. L. — F.M. Civil Appeal No. 49 of 1960]

Unincorporated Association — Suspension — Satisfaction of President — bona fide — Natural Justice — Exhaustion of domestic remedies.

This was an appeal from the decision of Ong J. The appellant, an ordinary member of the M.I.C. (an unincorporated association), asked for a declaration that his suspension from membership under Article 28 of the M.I.C. Constitution was null and void and for an injunction to restrain the defendant, the President of the M.I.C., from preventing him from exercising his rights and privileges as a member of the M.I.C. and for damages. The appellant alleged that the respondent had not acted *bona fide* and that he had not complied with the principles of natural justice. The appellant did not resort to the domestic remedy provided in Article 28 of the M.I.C. Constitution but applied straight to the Courts.

Held: (1) it was not necessary in the present case to examine the principles of natural justice;

(2) it was proved beyond doubt that there were no grounds on which the respondent could be satisfied that the appellant had acted to the detriment of the M.I.C.;

(3) it was a condition precedent that the appellant should resort to the domestic remedies provided before resorting to the Courts.

Decision of Ong J. [1960] M.L.J. 257 affirmed on different grounds.

Cases referred to:—

(1) *Green* v. *Howell* [1910] 1 Ch. D. 495.
(2) *Ross-Clunis* v. *Papadopoullos* [1958] 2 All E.R. 23, 33; [1958] 1 W.L.R. 546.
(3) *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478, 485; [1922] All E.R. Rep. 45.
(4) *Scott* v. *Avery* (1856) 5 H.L. Cas. 811.
(5) *Atlantic Shipping & Trading Co. Ltd.* v. *Louis, Dreyfus & Co.* [1922] 2 A.C. 250; [1922] All E.R. Rep. 559.
(6) *Andrews* v. *Mitchell* [1905] A.C. 78.
(7) *Wayman* v. *Perseverance Lodge of the Cambridgeshire Order of United Brethren Friendly Society* [1917] 1 K.B. 677.
(8) *Judson* v. *Ellesmere Port Ex-servicemen's Club* [1948] 2 K.B. 52; [1948] 1 All E.R. 844.
(9) *Bonsor* v. *Musicians' Union* [1954] 1 All E.R. 822; [1954] Ch. 479; [1954] 2 W.L.R. 687.
(10) *White* v. *Kuzych* [1951] A.C. 585; [1951] 2 All E.R. 435.

COURT OF APPEAL.

R. R. Chelliah for the appellant.

Athi Nahappan for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This appellant was, and probably still is, a member of the Malayan Indian Congress and the respondent is, and at all material times was, the President of that body which is an unincorporated association of Indians resident in Malaya founded to promote the political and cultural interests of such persons and a variety of other similar amiable interests.

The Constitution of this association provides that its members shall consist of ordinary members and associate members. As regards ordinary members it provides by Article 4(a) that any Indian in Malaya who has attained the age of eighteen years and who subscribes to the aims and objects of the Congress and undertakes to abide by its rules and regulations shall be eligible for ordinary membership. By Article 5 any person intending to be a member must apply for admission on a printed enrolment form.

The management of the organisation is entrusted to a number of Committees including one known as the Working Committee.

Articles 28 and 29 deal with the suspension and expulsion of members. Article 28 should be quoted in full. It reads as follows:—

"The President of the Malayan Indian Congress shall have power to suspend a member if he is satisfied that, that member is acting in a manner in any way detrimental to the Congress. As a precaution against the abuse of this power the member so suspended shall have the right of appeal to be heard at any subsequent meeting of the Working Committee, whose decision after hearing both the appeal and the President's justification of his action shall be final and conclusive."

Article 29 provides that if any member "acts in the opinion of the Central Working Committee in any way detrimental to the principles or objects or violates the constitution of the Congress" the Central Working Committee may call upon him to show cause why he should not be suspended or expelled. In certain circumstances after holding an enquiry of which notice has been given to the alleged offender the Working Committee may suspend him from membership or expel him.

The appellant became an ordinary member of the Congress and on doing so must be held to have entered into a contract with all the other members, including the President, the terms of which are to be found in its Constitution.

On 16th May, 1958, the President without any intimation of any sort that he had it in mind to take such a step addressed the following letter to the appellant:—

"Mr. A. Tharmalingam,
152, Sungei Besi Road,
Kuala Lumpur

Sir,

This is to inform you that I have decided to suspend you forthwith from membership of the Malayan Indian Congress.

You have, in accordance with section 28 of the M.I.C. Constitution, the right of appeal to the Working Committee.

If you wish to appeal to the Working Committee, you may indicate your desire to the Secretary-General, who will then inform you the time and date at which your appeal will be heard.

Yours faithfully,
Sd: V. T. SAMBANTHAN,
President."

The date of that letter is said to be significant because on 18th May, 1958, two days later, there was due to be held the Annual Delegates Conference of the Selangor State Congress, an organic part of the Indian Congress, at which office-bearers for the year 1958 were to be elected. The appellant had apparently entertained some hopes of being elected to some sort of office at this meeting but he has alleged on the pleadings

that as a result of being suspended by the letter of 16th May he was prevented from attending it. I am not at all clear why or how he was prevented but the fact that he was so prevented is admitted by the defendant on the pleadings and must be accepted.

The appellant did not, as he might have done under Article 28, appeal to the Working Committee against the President's action. What he did was to commence the present proceedings on 13th June, 1958. In these he asked for a declaration that his suspension from membership of the Congress is null and void, for an injunction to restrain the defendant from preventing him from exercising the rights and privileges of a member of the Congress and for damages. His case, briefly, was that the respondent had not acted *bona fide* but on the contrary had acted capriciously and maliciously and contrary to the principles of natural justice.

During the interlocutory proceedings there was a considerable amount of what I might call tactical fencing which I do not think it is necessary to deal with here. In due course, however, the matter came on for trial before Ong J., and most curiously at the trial there was a complete absence of any conflict of testimony. That was no doubt due to the tactical fencing which has been mentioned but the fact remains that the case would appear to be unique in that not a word seems to have been said that gives any indication at all as to the nature of the real dispute between the parties.

The only witness called at the trial was the appellant himself. He related the facts of the case very much as they have been set out here. He said that he was never informed what the charges against him were nor was he given any opportunity to answer any charge against him. Prior to receiving the respondent's letter of 16th May, 1958, he had no notice of any intention on the part of the respondent to act against him under Article 28 of the Constitution. As far as he was aware the respondent had held no enquiry before suspending him. Finally he said: "I have not acted in any way detrimental to the interests of the Malayan Indian Congress".

He was not cross-examined on any of these statements nor was the defendant or any other witness called for the defence to contradict them. For the purpose of the present proceedings, therefore, these statements must be taken as proved.

In the event Ong J. gave judgment in favour of the respondent and against that the appellant has now appealed.

Ong J. dealt with the matter in a long, careful and wholly admirable judgment which is too long for quotation and which is so closely reasoned that it cannot be easily summarised.

Briefly, he took the view that the only condition which Article 28 imposed on the President was the subjective one that he should be satisfied and that he was in a position analogous to that of the defendant in the case of *Green* v. *Howell*[1] who was a partner who had expelled a fellow partner from the partnership for a breach of the partnership agreement without having given the expelled partner any opportunity of being heard or any notice of any cause of complaint against him. In any event he was of the opinion that the appellant was not entitled to come to the Court until he had exhausted his remedies under the Constitution itself by appealing to the Working Committee. He accordingly dismissed the action.

For myself I have reached the same conclusion that the action should have been dismissed. I have, however, reached that conclusion by a course of reasoning which does not altogether coincide with that of Ong J., and which I propose to state in my own way.

As has been said, all these questions of the relationship among members of an unincorporated association are matters of contract and the contract is to be found in the Rules or the Constitution of the association. If a member does not like the rules he has two courses open to him. Either he can refrain from joining the association, and in the present case I would observe in parenthesis that the Malayan Indian Congress has nothing in common with a trade union, membership of which may be a vital necessity if a person is to earn his livelihood. Or if he does join he can attempt to persuade his fellow members to change the rules. But so long as he remains a member and so long as the rules are there his relationship with his fellow members falls to be regulated by them.

And these rules are to be interpreted like any other contract.

To my mind this consideration for reasons which I am about to state absolves me from any necessity to consider the principles of natural justice which is at present proving as unruly a horse as did public policy in a previous generation.

When the appellant joined the Congress he held himself out to be a person who undertook to be bound by its rules (see Article 5). And from this it would seem to follow he agreed that be could be suspended from membership by the President, if the President "is satisfied" that he "is acting in a manner in any way detrimental to the Congress".

Had the provisions of Article 28 rested there then in my opinion the appellant might have had a good case. Before he could be suspended by the President that functionary had to be "satisfied" that he was acting in a way detrimental to the Congress. Now, clearly the test as to the point at which the President attained satisfaction must be a subjective one and as such would not generally be of a sort open to examination by the Court. Satisfaction, however, whatever be the point at which it be attained, implies two things. It implies that the President must have acted in good faith and that he must have applied his mind to at least some material that was relevant to the state in which it later found

itself. And as was said by Lord Morton of Henryton in the case of *Ross-Clunis* v. *Papadopoullos*[2]:—

"Their Lordships . . . . . think that if it could be shown that there were no grounds on which the appellant could be so satisfied, a court might infer either that he did not honestly form that view or that, in forming it, he could not have applied his mind to the relevant facts".

In the present case it was proved, and proved beyond question, that there were no grounds on which the respondent could be satisfied that the appellant had acted to the detriment of the Malayan Indian Congress. The appellant said on oath: "I have not acted in any way detrimental to the interests of the Malayan Indian Congress". That was neither questioned nor denied in any way and it must be accepted. In the circumstances I am of the opinion that it is a case where the Court not only may infer but should infer that the respondent could not have applied his mind to the relevant facts, for the simple reason that there were no relevant facts.

The matter, however, does not rest there for Article 28 after giving the President the power of suspension goes on to provide that as a precaution against any abuse of its exercise any member who becomes the object of it shall have the right of appeal to the Working Committee who can only decide the matter after hearing "both the appeal and the President's justification of his action".

As a matter of construction it seems to me that the true interpretation of these provisions in the light of Article 5 is that the member undertakes not to pursue his undoubted remedy of having recourse to the Courts until he has exhausted his remedies under the Constitution, that is to say, until he has made his appeal to the Working Committee and had it disposed of.

I can see no reason, if this interpretation be correct, why such an agreement should not be upheld. It is true that any agreement which involves ouster of the jurisdiction of the Court is unenforceable as being contrary to public policy. That is well settled law. But, as was said by Bankes L.J. in the case of *Czarnikow & Co. Ltd.* v. *Roth, Schmidt & Co.*[3]:—

"No one has ever attempted a definition of what constitutes an ouster of jurisdiction. Each case must depend on its own circumstances".

And it is abundantly clear from the arbitration cases (e.g. *Scott* v. *Avery*[4]; *Atlantic Shipping & Trading Co. Ltd.* v. *Louis, Dreyfus & Co.*[5]) that where an agreement only requires arbitration as a condition precedent to constitute a cause of action for breach of the contract then such a stipulation is good and enforceable.

Here Mr. Chelliah in the course of a very persuasive argument has referred us to a number of cases which he says show that in a case such as the present one an aggrieved member of an association may go to the Court without exhausting the remedies afforded to him by the rules of the association. None of these cases, however, is wholly in point. *Andrews* v. *Mitchell*[6] and *Wayman* v. *Perseverance Lodge of the Cambridgeshire Order of United Brethren Friendly Society*[7] were concerned in effect with the application of section 68 of the Friendly Societies Act, 1908, which provides that disputes between a member of a friendly society and the society shall be decided in the manner directed by the rules of the society and that any decisions so given shall be binding and conclusive without appeal. But in both cases the society whose conduct was complained of acted in a manner other than that directed by its own rules. *Judson* v. *Ellesmere Port Ex-Servicemen's Club*[8] raised a similar point under the Industrial and Provident Societies Act, 1893. In *Bonsor* v. *Musicians' Union*[9] the plaintiff went to the Court without taking advantage of the right of appeal which he possessed under the rules of his union. There again, however, there had been a clear breach of the rules on the part of the union or its officers because the purported expulsion of the plaintiff had been by a subordinate functionary of the union who under the rules had no power to expel anyone.

On the other hand, in the case of *White* v. *Kuzych*[10] the respondent had been expelled from a trade union and had gone to the Courts for relief without exercising a domestic right of appeal given to him by the union's rules. He achieved some success in the Canadian Courts, but ultimately their Lordships of the Privy Council were against him. He had in fact promised in terms when he became a member of the Union that he would not take any legal proceedings against it until he had exhausted all remedies allowed to him by its Constitution and by its byelaws and in allowing the appeal from the Canadian Courts Viscount Simon said (at p. 594):—

"It is a crucial circumstance in the present litigation that it was instituted by the respondent without first appealing to the federation from the findings against him in the report and the resolution of expulsion subsequently adopted at the general business meeting."

It is true that in that case the undertaking not to go to the Courts was in terms and not, as here, a matter of interpretation. It is clear, however, that what their Lordships regarded as a "crucial circumstance" was not the terms of the undertaking but the fact that it was given. And it is to be noted that in that case the question of any such undertaking being bad as constituting an ouster of the jurisdiction of the Courts was never at any time raised.

In the circumstances I am compelled to the view that the appellant's approach to the altar of

Themis has been premature. He was bound by the terms of his contract, in the first place to take his case to his own Gods who preside over the Working Committee of the Indian Congress. That was a condition precedent to any cause of action he might have for the breach of the contract between himself and the President or any other of his fellow members. I am thus compelled to take the view that Ong J. was right in dismissing the action and for myself I would dismiss the appeal against his decision with costs.

Hill J.A. and **Ismail Khan J.** concurred.

Appeal dismissed.

Solicitors: *R. R. Chelliah; Nahappan & Co.*

PONNIAH v. CHINNIAH

[C. A. (Thomson C.J., Good and Neal JJ.) May 27, 1959]

[J. B. — F.M. Civil Appeal No. 50 of 1958]

Land Laws — Charge — Johore Land Enactment — Refusal of chargee to grant discharge — Johore Land Rules 1929, r.37 — Jurisdiction of Court — Federation of Malaya Constitution, Arts.121, 172 — Admission of evidence to establish oral agreement — Evidence Ordinance, 1950, s.92.

The respondent charged his land to the appellant by way of security for a loan of $6,750. Upon the refusal of the appellant to grant a discharge of the charge when the loan had been repaid, the respondent applied for an order directing the appellant to grant such a discharge or alternatively that the Commissioner of Lands for Johore or the Collector of Land Revenue at Kluang should be ordered to discharge the charge and make the necessary consequential memorial on the document of title. The respondent alleged at the trial that part of the repayment was made in pursuance of further oral agreement made between the two parties whereby the respondent agreed to pay the appellant a share in the profits of a building project which the respondent was carrying out on his land with the aid of the borrowed money. The learned trial Judge refused to allow evidence to be given of this oral agreement on the ground that it was evidence to vary the terms of the original loan agreement. On appeal,

Held: (1) the Court has jurisdiction to deal with the matter;

(2) evidence of the oral agreement was wrongly excluded, it not being within the ambit of section 92 of the Evidence Ordinance.

COURT OF APPEAL.

A. N. Mitra for the appellant.

R. Murugason for the respondent.

Cur. Adv. Vult.

Thomson C.J.: The respondent to this appeal is the registered proprietor of country land some six acres in extent in the State of Johore and on 6th May, 1958, he applied by way of Originating Summons for certain reliefs in connection with a charge on the land which he had granted in favour of the appellant on 9th January, 1955.

I would observe *in limine* that the respondent was asking for the discharge of a charge of land which is the equivalent under our land laws of a reconveyance of mortgaged property and it was therefore open to him to proceed by way of Originating Summons under Order LV rule 5A. His solicitor, however, must have been well aware that there was a dispute as to the facts of the case and in the circumstances the proceedings should have been commenced by Writ (see *White Book*, 1959, p. 1503). In my view this was not in itself fatal to the respondent's case but if it has involved any extra costs, as it may have done in the circumstances of the present case, these should be borne by the respondent in any event.

The respondent's case was that a few days prior to 9th January, 1955, the appellant agreed to lend him $6,750 without interest for a period of six months. The money was paid and on 9th January, 1955, he executed a charge over his land in accordance with the provisions of the Johore Land Enactment setting out the terms of the previous oral agreement and charging his land by way of security for the loan. On 9th July, 1955, when the loan became repayable he had only paid $600. Subsequently, however, he paid sums amounting to $6,150 in satisfaction of the balance of the loan and the appellant having refused to grant a discharge of the charge he asked for an order directing the appellant to grant such a discharge or alternatively that the Commissioner of Lands for Johore or the Collector of Land Revenue at Kluang should be ordered to discharge the charge and make the necessary consequential memorial on the document of title.

The appellant admitted the terms of the oral contract of loan and after some preliminary lying he admitted that he had received $6,750 in all from the respondent. He alleged, however, that when the loan was not repaid on 9th July, 1955, the respondent asked him for further time to pay and that he agreed to this on consideration of the respondent agreeing to pay him a share in the profits of a building project which the respondent was carrying out on his land with the aid of the borrowed money. In his affidavit he was very vague as to the details of this agreement but he alleged that a number of the payments subsequently made to him by the respondent were made in pursuance of it and not in repayment of the original loan in respect of which the charge had been granted.

In the event the trial Judge refused to admit evidence of this alleged oral agreement on the ground that it was evidence to vary the terms of the original loan agreement and granted the respondent the relief for which he asked.

Against that decision the appellant has now appealed.

His first ground of appeal is that the Court had no jurisdiction to deal with the matter. He based his argument on rule 37 of the Johore Land Rules, 1929, which provides that where a charge in respect of country land not exceeding 100 acres is alleged to have been satisfied but the signature of the chargee as to such satisfaction cannot be procured the owner of the land may apply to the Commissioner of Lands to exercise his powers under section 54 of the Land Enactment and that the Commissioner shall after due inquiry make such order as to the cancellation or otherwise of the charge as he may think fit.